

REMARKS

Restriction Requirement

Applicants affirm the election made during the telephone conversation with Examiner Schillinger on November 2, 2006 in which Applicants elected to prosecute claims 25-27. Applicants request that claims 1-19 and 28-33 be withdrawn without prejudice for prosecution in a divisional application should no generic claim be found allowable.

Objection to the Drawings

The drawings were objected to for failing to include the reference numeral 90 as mentioned in the specification. Amended Figure 28 including reference numeral 90 is attached hereto. Applicant respectfully requests that the objection to the drawings be withdrawn.

Rejections Under 35 U.S.C. §102

Claims 25-27 were rejected under 35 U.S.C. §102 as being anticipated by U.S. Patent No. 5,549,679 to Kuslich. Applicants respectfully traverse this rejection. A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." See MPEP §2131, citing Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Independent claim 25 recites a device adapted for insertion into a vertebral body. The '679 Patent is directed to a device configured for use in an intervertebral space. In, Kuslich v. Hochschuler, the Board found that claims directed to treating the vertebral body were patentably distinct from the Kuslich '679 Patent which is directed to treating the interbody disc space. See Kuslich v. Hochschuler, Interference No. 105,252, p.13 (BPAI 2005). The claims directed to treating the vertebral body that were included in the Kuslich Interference are set to issue in U.S. Patent

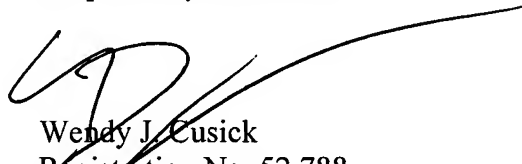
Application No. 10/440,036. The claims of the present application were awarded to Spineology as part of the resolution of the Kuslich Interference.

Applicants believe the present claims are patentably distinct from the Kuslich '679 Patent and the claims of the Kuslich 10/440,036 Application. Claims 25-27 are directed to treating a vertebral body, not the interbody disc space. As such, claims 25-27 are patentably distinct from the Kuslich '679 Patent which discloses treating the disc space. Further, there is no disclosure in the Kuslich '679 Patent or the Kuslich 10/440,036 Application of an expandable container including an upper wall member, a lower wall member, and a circumferential wall member, said wall members together defining a single chamber adapted to be inserted into a vertebral body.

Dependent claims 26-27 were also rejected in light of the '679 Patent. Although these claims depend from an independent claim that Applicants believe is allowable, claims 26-27 have been amended to clarify that the recited shapes are with respect to a transverse plane as depicted in FIGS. 17-22. The '679 Patent does not disclose a horseshoe or triangle shape in a transverse plane as recited in amended claims 26-27. Based on the foregoing, Applicants respectfully submit that claims 25-27 are in condition for allowance.

The Examiner is invited to telephone the undersigned if the Examiner believes it would be useful to advance prosecution.

Respectfully submitted,



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